AW SING MOEY & ORS

v.

MELOMBONG & PERUMAHAN SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-22-97-1998]
30 OCTOBER 1998

LEGAL PROFESSION: *Practice and etiquette - Acceptance of brief - Whether embarrassed - Confidential information - Professional independence - Conflict of interest - Advocate who acted for both sides now wanted to act for one against the other in same matter - Whether should be disqualified - Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5*

This was an application by the defendant for an order that one Lim Chong Leong ('Lim') and his legal firm Ahmad Daud, Selva and Pang ('ADSP') be disqualified from acting for the plaintiffs. The defendant contended that there would be a conflict of interest if Lim were allowed to act for the plaintiffs as Lim was privy to certain confidential information in respect of the plaintiffs' present suit.

Held:

[1] Lim and ADSP should not have accepted instructions or a retainer on behalf of the plaintiffs because of the special circumstances that would make it difficult for them to either maintain professional independence or project a course of conduct compatible with the best interests of justice. Lim should have refused the brief as he had advised another party on the same matter and because he was in possession of confidential information.

[2] A counsel who receives briefs for both sides in the same case should not accept one if he has already read the other. Here, Lim had acted for both sides and now wanted to act for one against the other in the same matter. Clearly, Lim and ADSP would be embarrassed.

[Application allowed.]

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5

For the defendant - Joginder Singh (Sherilin Mohamed Ali with him); M/s Yeap & Yong
For the respondents - Lim Chong Leong; M/s Azam Lim & Pang

Reported by Alex KC Lee

JUDGMENT

RK Nathan J:

The Application

This is an application by the defendant for an order that Mr. Lim Chong Leong (Lim), an advocate and solicitor, and his legal firm of Ahmad Daud, Selva & Pang be disqualified from acting for the plaintiffs in this action. There was also a prayer for costs against the plaintiffs. The application is premised on the basis that there will be a conflict of interest if Lim is allowed to act as he is privy to privileged knowledge and/or confidential information with regard to this suit.

Backgrounds Facts

The plaintiffs among others were at one time squatting on land belonging to Suharta Development Sdn Bhd (Suharta) in 1991. Suharta wanted the land for development purposes. The plaintiffs thus entered into an agreement with Suharta on 12 November 1991 whereby it was agreed that in consideration of the plaintiffs moving out of the said land Suharta would:

(a) relocate or resite the plaintiffs on land nearby, "Site C", belonging to Abra Development Sdn Bhd (Abra);

(b) build and sell to each of the plaintiffs low cost flats/apartments for them to move in within two years from the date of the agreement signed with the contractors;

(c) have obtained Abra's permission to relocate the plaintiffs on Abra's land.

Sometime during the end of 1992 Abra was required to surrender its land "Site C" to the State Government of Selangor (State Government). On 9 April 1994 the State Government realienated "Site C" to the Majlis Perbadanan Ampang Jaya (Majlis) for development purposes. In July 1994 the Majlis entered into a joint venture agreement with one Maxisegar Construction Sdn Bhd (Maxisegar) whereby, *inter alia*, Maxisegar:

(a) would be the developer undertaking the development project including "Site C";

(b) would construct for the Majlis a 17-storey office tower, car park, an amphitheatre and a landscaped open area, all within 24 months.

A firm of solicitors, namely, T.H. Su & Co, acted:

(a) firstly for Suharta, Abra and the plaintiffs in evicting the plaintiffs from Suharta's land and relocating them on "Site C";

(b) secondly, for Maxisegar, the defendant and the plaintiffs:

(i) in evicting the plaintiffs from "Site C" and relocating them at the present site;

(ii) in negotiating and/or holding discussions with the plaintiffs *inter alia* on behalf of Maxisegar and/or the defendant in evicting and relocating the plaintiffs.

Incidentally, the defendant herein and Maxisegar and Abra were and are at the material time subsidiary companies under the Talam Group of Companies.

Findings Of The Court

Lim worked as a legal assistant in the legal firm of T.H. Su & Co from 1991 to 5 February 1994. He also admitted that he was involved in the eviction and relocation of the plaintiffs on behalf of Suharta. It is not in serious dispute that the plaintiffs refused to vacate "Site C" and deliver vacant possession of the same to Maxisegar to enable the latter to develop "Site C" pursuant to the joint venture agreement. As a result thereof Maxisegar caused the defendant (since both belong under the same Talam umbrella) to enter into agreements with the plaintiffs on or about 22 August 1994 and in consideration of the defendant selling low cost houses to the plaintiffs, the plaintiffs agreed and indeed did deliver vacant possession of "Site C" which Maxisegar has since developed. In fact the legal firm of T.H. Su and Co acted for Maxisegar and the defendant by talking to and negotiating with the plaintiffs and in obtaining vacant possession of "Site C". The said firm even prepared the sale and purchase agreements between the defendant and the plaintiffs on or about 22 August 1994.

There is clear affidavit evidence that Lim's portfolio as legal assistant of T.H. Su and Co related mostly to handling matters involving these squatters. He in fact took part in meetings and discussions held by the defendant and/or Maxisegar for the purpose of finding solutions to the squatter problem on their lands which would include "Site C". I therefore find as a fact that Lim was clearly privy to privileged knowledge and information connected with this suit.

Lim's main defence as averred in his affidavit is that he had resigned from the legal firm of T.H. Su & Co on 6 January 1994 and that at that time the joint venture agreement between the Majlis and Maxisegar and the problems relating to the removal of the plaintiffs from "Site C" had not materialised.

Lim in his affidavit denied any knowledge as to whose land it was that the said squatters were relocated upon. He however has averred in his affidavit in reply that when Suharta refused to sell the low cost houses to the plaintiffs, the defendant agreed to sell them the same. Lim has not stated how he became privy to this information. I cannot but conclude that he must have obtained such information from the defendant, or Maxisegar or from T.H. Su & Co. Lim also denied having any confidential or privileged information relating to this case. He also contended that he did not know of the joint venture agreement between the Majlis and the Talam Group. This averment has been categorically denied by the defendant's general manager, in his reply. He has averred that Lim was aware and was indeed informed that the land in question was owned by Abra which was a subsidiary of the Talam Group. In any case the problem with the plaintiffs being on "Site C" was already there during the time Lim was in the employ of T.H. Su & Co. I accept the averment of the general manager that although the joint venture agreement was executed in 1994, discussions and negotiations in respect of the said joint venture had begun in 1993 itself. In fact a draft agreement was exhibited prepared by T.H. Su & Co on 31 December 1993 for Maxisegar's approval. Lim's resignation letter from T.H. Su & Co which is also exhibited, is dated 6 January 1994. He was clearly with the legal firm when the draft was prepared and forwarded for approval.

I find that this is a clear instance when Lim and his present legal firm ought to have declined to accept instructions or obtain a retainer on behalf of the plaintiffs because of the existence of special circumstances which would render it difficult for him and his firm to maintain a professional independence and project a course of conduct compatible with the best interest of the administration of justice. Clearly Lim and his firm would be embarrassed on the basis of conflict of interest. The special circumstances alluded to earlier must no doubt refer to his acting earlier for the various parties involved herein in respect of the same matter whilst a legal assistant with the firm of T.H. Su & Co. Lim should have refused to accept this brief as he has clearly advised another party on the same matter and also because of the fact that he is in possession of confidential information. It is trite law that a counsel who receives briefs for both sides in the same case should not accept one brief if he has already read the other; what more if counsel had in fact been acting for both sides and now wishes to act for one against the other in the same matter. Rules 3, 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 read as follows:

> 3. Advocate and solicitor not to accept brief if embarrassed.
>
> (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises -

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

4. No advocate and solicitor to accept brief if professional conduct likely to be impugned.

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

5. No advocate and solicitor to accept brief if difficult to maintain professional independence.

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

(b) (i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

To my mind these rules clearly apply to Lim and his firm.

I therefore grant an order in terms of the defendant's application. I must emphasise that any finding I have made in respect of this application must perforce relate only to this application and shall not bind the parties in the main trial or other related applications.